

As part of the promulgation of the Clean Water Act Section 316(b) Existing Facility Rule, EPA consulted with the U.S. Fish and Wildlife Service and the N.O.A.A. Fisheries (the Services) under Section 7 of the Endangered Species Act. The Biological Opinion provided to EPA for the Rule concluded that the action was not likely to jeopardize species or destroy or adversely modify designated critical habitat for species and habitat identified in the Biological Opinion. The Services provided a reasonable and prudent measure that specified EPA will use its authorities under the CWA to minimize impacts to listed species pursuant to the 316(b) Rule and CWA.

The following terms and conditions were provided to implement the reasonable and prudent measure. As requested by the Services, EPA is reporting on the status of each term and condition and providing any required information.

1. EPA will ensure the Directors notify both Services and EPA of control measures, monitoring, or reporting recommendations provided by the Services that have been adopted as permit conditions. A copy of the draft permit provided to the Services per 40 CFR 124.10(c)(1) prior to finalization of the permit will satisfy this requirement.

**Status:** EPA has been working to ensure that all permitting authorities are complying with the existing requirement at 40 C.F.R. § 124.10 to provide a copy of the draft permit to the Services and is unaware of any non-compliance.

2. EPA will report and provide to the Services:
  - a. an annual report summarizing the facility monitoring data submitted by State Directors to EPA pursuant to 125.98(k), including data on impacts to ESA-listed species or critical habitat. If the Director (based on recommendations from the Services during their review of permit applications or draft permits) requires additional reporting per year, then that reporting from the state Director will be provided in addition to the annual summary report. The annual report must summarize any monitoring reports submitted by facilities to state Directors. EPA will provide the compiled raw data to the Services when the State provides such data to EPA. EPA will also seek to provide additional raw data from the Director's summarized reports if requested to do so; and

**Status:** EPA has prepared annual reports for October 2014 to December 2015 and January 2016 to December 2016 and is providing those reports with this status update. EPA did not receive any monitoring data pursuant to 125.98(k) during the first 2 annual reporting periods as relayed to the Services verbally during periodic coordination meetings.

- b. the annual report must include a table that identifies all ESA-listed species taken by CWIS along with the total number of organisms taken (deaths and injuries) per

year at each facility as reported to EPA by the state Director pursuant to 125.98(k).

**Status:** EPA has prepared a table to assist the permitting authorities in providing this data. This table format was presented to the Services during periodic coordination meetings. EPA has not received any reported take pursuant to 125.98(k) during the first 2 annual reporting periods as relayed to the Services verbally during periodic coordination meetings.

3. In order to review the effectiveness of the technical assistance process between the Directors and the Services as outlined in the Rule, EPA will report the following to the Services on an annual basis for the first four years following implementation of the Rule. As described in the Rule, data requirements for permit applications may warrant several years of data collection. Therefore, the number of permits issued may increase after the initial four year period. If necessary, the Services may subsequently request EPA to report on a semi-annual basis:

- a. A list of all state permits issued pursuant to 316(b); and

**Status:** EPA has prepared annual reports for October 2014 to December 2015 and January 2016 to December 2016 and is providing those reports with this status update. EPA has provided a list of all permits known to be subject to the 316(b) Existing Facility Rule with permit issuance and expiration dates.

- b. Of those permits issued pursuant to 316(b), identification of any that were elevated by the Services to an EPA's Regional Office and how those elevations were resolved.

**Status:** EPA did not receive any formal elevation requests.

4. Within 60 days of finalization of the Rule, EPA will provide each State Director an instructional memorandum developed in coordination with the Services detailing the technical assistance process that is to occur between the Services and the Directors. The memorandum will also further explain how Directors are to interpret the various aspects of the Rule, consistent with the April 8, 2014, correspondence from EPA (attached as Appendix A).

**Status:** EPA prepared and provided this memorandum to permitting authorities on December 11, 2014 and it remains available on EPA's cooling water intake structure website.

[https://www.epa.gov/sites/production/files/2015-04/documents/cooling-water\\_esa-instructional-memo\\_12-11-2014.pdf](https://www.epa.gov/sites/production/files/2015-04/documents/cooling-water_esa-instructional-memo_12-11-2014.pdf)

5. Within 60 days of finalization of the Rule, EPA will provide the Services a list of those facilities which are currently operating under administratively continued permits and may be subject to the Rule.

**Status:** EPA provided a preliminary list to the Services in June 2014. EPA is providing an updated list of all permits known to be subject to the 316(b) Existing Facility Rule which identifies all permits that have been administratively continued as of the ICIS search date of February 13, 2018.

6. EPA will request Directors reopen any currently administratively continued permit if the Services determine the facility's CWIS operations may have more than minor detrimental effects to federally-listed species or critical habitat.

**Status:** EPA has not been provided any such request by the Services to date.

7. If incidental take as quantified for an individual facility through the technical assistance process is exceeded, EPA will request the State or Tribal Director reopen the permit to analyze if additional control measures, monitoring, and reporting are necessary to further minimize adverse effects on ESA-listed species.

**Status:** EPA is not aware that the Services have provided an estimate of incidental take to any facility yet through the technical assistance process and has not received any reports of take by a facility to date.

8. EPA will inform Directors that pursuant to the Services Consultation Handbook (1998) if an owner/operator locates dead or injured federally-listed species, immediate notification must be made to the appropriate Field Office of the USFWS and/or Regional Office of the NMFS. Pertinent information including the date, time, location, and possible cause of injury or mortality (e.g. impingement or entrainment) of each species shall be recorded and provided to the Services. Instructions for proper care, handling, transport, and disposition of such specimens will be issued by the Services. Care must be taken in handling sick or injured animals to ensure effective treatment and in handling dead specimens to preserve biological material in the best possible state.

**Status:** EPA has worked with the permitting authorities to ensure that permittees are aware of their obligations under ESA and this Biological Opinion.